

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DELENA M. HARMS
Claimant

V.

**TRAINING & ENFORCEMENT
CENTER OF HUTCHINSON**
Respondent

AND

ACCIDENT FUND GENERAL INS.
Insurance Carrier

CS-00-0327-210
AP-00-0444-973

ORDER

Respondent and its insurance carrier (respondent) requested review of the August 9, 2019, Post-Award Medical Award by Administrative Law Judge (ALJ) Thomas Klein. This is a post-award hearing proceeding for medical benefits and attorney fees. The Board heard oral argument on December 12, 2019.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the post-award record and adopted the stipulations listed in the Award.

ISSUES

The ALJ determined Dr. Baoluan Nguyen remains claimant's authorized treating physician for pain management. The ALJ wrote:

Dr. Nguyen remains the authorized treating physician for pain management and the court will not change or modify his opinions on what is medically necessary. The court specifically allows Dr. Nguyen to continue percocet and cyclobenzaprine consistent with Dr. Nguyen's opinion.

The court awards claimant's attorney fees in the amount of \$1,073.00 pursuant to the affidavit attached as claimant's exhibit 2 to the August 9, 2018 Post Award Hearing.¹

Respondent argues the ALJ's Award should be reversed. Respondent maintains the prevailing factor for claimant's continued need for pain medication is claimant's preexisting conditions and not the work-related accident of August 28, 2014.

Claimant argues the ALJ's Award should be affirmed.

Respondent initially listed attorney fees as an issue in its petition for review. The Board has received correspondence from the parties advising the issue has been resolved.

The sole issue for the Board's review is: is claimant's work accident the prevailing factor for her alleged need for oxycodone-acetaminophen (Percocet) and cyclobenzaprine prescriptions?

FINDINGS OF FACT

Claimant sustained a crush injury to her right foot in the course of her employment on August 28, 2014. The parties entered into an Agreed Award on September 23, 2016, based upon a rating of a 17.5 percent permanent partial functional impairment to the right lower extremity at the level of the lower leg. Future medical treatment was left open.

Claimant applied for post-award medical treatment. Respondent provided orthopedic braces and supports as needed, and continues to do so. Claimant was also provided pain management. However, because claimant had been previously prescribed the same pain medications for conditions not related to her work injury, respondent applied to modify or terminate her medical benefits. A post-award preliminary hearing was held March 14, 2017. As a result, the ALJ issued an Order on May 19, 2017:

Dr. Nguyen is designated an authorized treating physician for pain management. He is authorized to provide pain management necessary to cure and relieve the claimant from the effects of her work related injury, whether or not claimant is currently being prescribed that medication for another purpose or body part also.

Claimant is a long time recipient of pain medication from conditions not related to her work related injury. The claimant testified that those same pain medications also help with the pain from her work injury and Dr. Nguyen has been prescribing them.

¹ ALJ Award (Aug. 9, 2019) at 3.

Claimant's attorney fees are awarded pursuant to claimant's exhibit 5 to the Post Award Hearing.²

Said Order was appealed to the Board and denied on jurisdictional grounds on July 31, 2017.³

Dr. Howard Aks, a board-certified anesthesiologist with a subspecialty in pain medicine, examined claimant at respondent's request on May 9, 2018. Claimant complained of pain in her right lower extremity. Dr. Aks reviewed claimant's available medical records, history, and performed a physical examination. Dr. Aks noted claimant's prior and ongoing use of Percocet, cyclobenzaprine, and gabapentin predating the work accident. Dr. Aks examined claimant's right foot and determined she sustained "right foot pain secondary to crush injury, and peripheral neuropathy secondary to crush injury."⁴ Dr. Aks testified he found it unusual claimant's medications did not increase or change following the work accident, as he would expect an increase in pain from the foot injury to cause an increase in her medication dosages.

Dr. Aks opined claimant's work accident of August 28, 2014, is not the prevailing factor in her need for Percocet or cyclobenzaprine. Dr. Aks explained he based his opinion on the fact claimant's medications did not change following the accident. Further, Dr. Aks finds claimant's right lower extremity pain to be mainly neuropathic, and narcotics such as Percocet are not effective for neuropathic pain. Dr. Aks recommended claimant's gabapentin dosage be increased to help her neuropathic pain.

Dr. Nguyen, a physician board-certified in internal medicine, provided pain management for over 10 years. Dr. Nguyen was claimant's primary care physician prior to her work accident, providing Percocet, cyclobenzaprine, and gabapentin for treatment of various preexisting health conditions. After the ALJ's Order authorizing Dr. Nguyen to treat claimant's work injury, he focused solely on her right lower extremity and referred claimant to a primary care physician closer to her residence. Dr. Nguyen testified he has not focused on anything other than claimant's work injury effective July 17, 2017.

Dr. Nguyen opined claimant's work accident is the prevailing factor in causing her right foot pain and peripheral neuropathy, and claimant will require long-term pain management for her condition. Dr. Nguyen testified the medications claimant took prior to the accident, namely the Percocet and cyclobenzaprine, were necessary for not only her preexisting conditions, but also for her right lower extremity condition. Dr. Nguyen

² ALJ Order (May 19, 2017) at 1.

³ *Harms v. Training & Enforcement Center of Hutchinson*, No. 1,074,286, 2017 WL 3422513 (Kan. WCAB July 31, 2017).

⁴ Aks Depo. at 10.

explained he did not increase her medications immediately following the work accident because he keeps narcotic dosages as low as tolerable. Dr. Nguyen stated he would have prescribed these medications for claimant following the accident regardless of whether she took them previously, as these medications help her current condition. Claimant continues to complain of pain in her right foot, with muscle spasm occurring with each step. Dr. Nguyen agreed gabapentin is necessary for claimant's neuropathic lower extremity pain. He increased claimant's gabapentin dosage on September 10, 2018.

Dr. Nguyen testified claimant's Percocet amount decreased over time, from one tablet every 4-6 hours as needed to one tablet every 6 hours as needed. Dr. Nguyen stated this is the amount currently necessary for claimant to function.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-510k states, in part:

(a)(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the

prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

K.S.A 2014 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2014 Supp. 44-508(f) states, in part:

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

In *Helmer v. Sinclair Masonry, Inc.*,⁵ the Board wrote:

[A]ll the medical evidence states Claimant requires the use of Hydrocodone to cure or to relieve the effects of the work-related lower extremity injuries Claimant needed Hydrocodone at the same dosage and frequency before the work-related accident, but Claimant's need pre-accident is irrelevant. Although Claimant's testimony that his prior back condition resolved is contradicted by his examining physician, and Claimant's admitted intentional misuse of Hydrocodone defies credulity, under the version of the Kansas Workers Compensation Act in effect on the date of accident, and its interpretive Board decisions, Claimant need only prove

⁵ *Helmer v. Sinclair Masonry, Inc.*, No. 1,070,613, 2016 WL 5886184 (Kan. WCAB Sept. 20, 2016).

the medication will cure or relieve the effects of the work-related injuries. Dr. Varner, Dr. Fevurly and Dr. Pratt also confirmed the medication prescribed by Dr. Varner will cure or relieve the effects of the work-related injuries. Therefore, Claimant's request for post-award medical must be granted.

The facts in *Helmer* are similar to this case. In *Helmer*, the claimant was receiving hydrocodone for a preexisting lumbar condition for a period of five years before the work related injury. After the date of the injury, the authorized treating physician prescribed hydrocodone, in the same dosage as before the work-related injury, to treat the work-related foot injury giving rise to the appeal. Mr. Helmer testified the hydrocodone decreased his foot pain. The authorized treating physician related the hydrocodone use to claimant's foot pain.

In this claim, the record is clear claimant was taking Percocet and cyclobenzaprine prior to her work-related injury for low back pain. Dr. Nugyen, the authorized treating physician, testified he would prescribe the Percocet and cyclobenzaprine for claimant's right lower extremity condition even if claimant had not had a preexisting condition. Similar to the facts in *Helmer*, the prescribed medications relieve the effects of both the prior condition and the work-related condition.

Considering all relevant evidence submitted by the parties, the Board finds claimant's work-related injury by accident is the prevailing factor causing her need for medical treatment. Based upon *Helmer*, the Board finds claimant's use of Percocet and cyclobenzaprine are necessary to relieve the effects of her work-related injuries.

CONCLUSION

Claimant met the burden of proving her use of Percocet and cyclobenzaprine are necessary to relieve the effects of her work-related injuries.

AWARD

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that Award of Administrative Law Judge Thomas Klein dated August 9, 2019, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

copies via OSCAR to:

David Farris, Attorney for Claimant

Matthew Schaefer, Attorney for Respondent and its Insurance Carrier

Hon. Thomas Klein, Administrative Law Judge